United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2129

To be argued by
LEONARD A. SCLAFANI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2129

VASSILIOS LULOS,
Petitioner-Appellant,

—*against*—

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK, NEW YORK, OR ANY OTHER PERSON HAVING THE SAID PETITIONER-APPELLANT IN CUSTODY,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

DAVID G. TRAGER,
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LEONARD A. SCLAFANI,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Costantino J.) entered on October 8, 1976, which dismissed appellant's petition for a writ of habeas corpus.

Appellant's petition was occasioned by a decision of the Board of Immigration Appeals which held that appellant was an alien who sought to enter and remain in the United States without a valid entry document and which ordered him excluded and deported.

By his petition, appellant sought to challenge the decision of the Board of Immigration Appeals and to have

the District Court commence a trial *de novo* on the factual issues previously determined by the Immigration and Naturalization Service and affirmed by the Board.

The District Court denied the appellant's request for a hearing *de novo* and dismissed the petition.

Statement of the Case

Vassilios Lulos, a 24 year old single, male, alien and a citizen and national of Greece, first entered the United States as a crewman aboard the Greek tanker "Thio Thannasis" in January 1970. (App. A-1).[1] He remained illegally in this country until August 18, 1975, when, after a hearing before the Immigration and Naturalization Service, he was ordered deported under Section 241 (a)(2) of the Immigration and Naturalization Act 8 U.S.C. § 1251 [hereinafter the "Act"] as an alien who had remained in the United States for longer than he was permitted. (App. A-1, A-3).

However, rather than be deported, and suffer the penalties concommittant therewith, Lulos sought and was granted permission to voluntarily depart on or before October 18, 1975. This date was ultimately extended at Lulos' request until May 30, 1976. (App. A-4). On that date, with the intention of securing a visa into the United States on the basis of a labor certification which he had acquired during his illegal overstay in the United States, Lulos boarded a plane for Costa Rica. (App. A-7).

Lulos remained in Costa Rica for two and one half months but was unsuccessful in his efforts to obtain a visa

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[1] References in parenthesis refer to Appellee's Appendix.

from the American Consulate there. Finally, on August 18, 1976, the Costa Rican government, finding that Lulos had illegally remained in that country, deported him back to the United States. (App. A-8, A-12).

Lulos arrived at Kennedy International Airport in New York on August 18, 1976, aboard Pan Am Flight 542 from Costa Rica. At the time of his arrival, he did not possess any valid documents which would entitle him to be admitted into the United States. (App. A-7, A-12). Accordingly, he was instructed both by officials of Pan American Airlines and by the immigration authorities that he could not legally enter the United States and that since he had no documents entitling him to go elsewhere, he was obliged to continue on to his country of origin, Greece, where he would be permitted to enter as a national and citizen. Despite these instructions, Lulos refused to board a plane for Greece claiming that he lacked documentation to go on to Greece. (App. A-8).

Finally, on August 19, 1976, the day following his arrival, Lulos appeared before the immigration inspectors at the airport. He was immediately detained as an alien seeking to enter the country without valid entry documents. (App. A-5).

Following a hearing on his admissibility held on August 24, 1976, Lulos was ordered excluded and deported by an immigration judge pursuant to Section 212(a)(20) of the Immigration and Naturalization Act. 8 U.S.C. § 1182(a)(20) on the ground that he was an immigrant who, at the time of attempted admission, did not possess a valid entry document. (App. A-15).

An appeal to the Board of Immigration Appeals [hereinafter the "Board"] followed at which time Lulos (through counsel) argued that he should be given an op-

portunity to depart voluntarily rather than be subjected to exclusion and deportation because he was brought here against his will. In support of his argument, Lulos cited *United States ex rel Bradley* v. *Watkins*, 163 F.2d 328 (2d Cir. 1947); *United States ex rel Pactau* v. *Watkins*, 164 F.2d 457 (2d Cir. 1947); and *United States ex rel Sommerkamp* v. *Zimmerman*, 178 F.2d 645 (3d Cir. 1949).

The Board however was not convinced by Lulos' argument and in a decision issued on September 8, 1976, decided that since Lulos had failed to rebut the presumption under Section 214(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1184(b) that he was an immigrant and since he had not presented any entry documents at the time that he attempted to enter the country, he was excludable under Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20) (App. A-24 et seq.).

Moreover, the Board found that the cases cited by Lulos for the proposition that an individual who is voluntarily brought into the United States is not considered to be an immigrant are only applicable to situations in which the individual is brought into this country against his will by agents of the United States or with the consent of the United States. Noting that Lulos had neither been brought here by agents of the United States nor with the consent of the United States, the Board found these cases to be inapplicable, and accordingly affirmed the decision of the immigration judge excluding Lulos from the United States. (App. A-27).

Thereafter, on September 20, 1976, Lulos petitioned the District Court for the Eastern District of New York for a writ of habeas corpus seeking a review of the decision of the Board and demanding that the District Court commence a trial *de novo* on the issue of his excludability. The question raised on this appeal as to whether the

District Director of the Immigration and Naturalization Service abused his discretion in granting Lulos parole only on the condition, *inter alia*, that he post a $5,000 appearance bond was not raised in Lulos' petition.

The District Court, after carefully considering the evidence of record, and all of the arguments of Lulos' counsel, held that the Court lacked jurisdiction to try the factual issues *de novo* and that the decision of the Board being correct and supported by substantial evidence, the petition should be dismissed. Accordingly, an order was entered by the court on October 8, 1976, dismissing the petition. (App. A-30). It is this order from which Lulos appeals.

Appellee contends that the District Court was correct in refusing to make an independent inquiry into the facts found by the Board or to try the factual issues *de novo*. Appellee also contends that the decision of the Board is supported by substantial evidence on the record and is in accord with the law. Finally appellee contends that this court may not review the determination that Lulos should be paroled only on the condition that he post an appearance bond and that even assuming review of that decision was proper, the appellee did not abuse his discretion.

ARGUMENT

POINT I

The District Court was correct in refusing to conduct a hearing de novo on the merits of this case.

Appellant contends that the District Court erred in denying his request for a hearing *de novo* to determine whether he should be excluded from the United States.

Since, as appellee will show hereinafter, a court reviewing an order of exclusion of the Immigration and Naturalization Service is without jurisdiction to conduct a *de novo* hearing on the merits of the case but must limit its review to a determination as to whether the decision of the Immigration and Naturalization Service is supported by substantial evidence on the Administrative Record, the District Court was correct in its denial.

It is a well settled principle of law that a proceeding for the exclusion and deportation of an alien is administrative.[2] *Kessler* v. *Strecker*, 307 U.S. 22 (1939), *Zakonaite* v. *Wolf*, 226 U.S. 272 (1912).

Accordingly, judicial review of such a proceeding is confined to the administrative record and a reviewing court may not interfere with the administrative findings, unless, upon the record, it appears that the proceedings were manifestly unfair or that substantial evidence to support the administrative determination is lacking. *United States ex rel Schlimmgen* v. *Jordan*, 164 F.2d 623 (7th Cir. 1948); *United States ex rel Rongetti* v. *Neelly*, 207 F.2d 281 (7th Cir. 1953); *Ciannamea* v. *Neelly*, 202 F.2d 289 (7th Cir. 1953); *Bufalino* v. *Holland*, 277 F.2d 270 (3d Cir. 1960).

The corollary to this principle is that it is not for a court reviewing an order of exclusion and deportation

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[2] Since with limited exceptions not here relevant the scope of judicial review in exclusion and deportation cases is the same, the cases cited herein involve review of both types of orders. See C. Gordon and H. Rosenfield, Immigration Law and Procedure § 8.13, p. 8-90 (1976).

to conduct a hearing to try factual issues *de novo* or to consider in a trial *de novo* matters which were or should have been considered in the administrative proceedings. *United States ex rel McLeod* v. *Garfinkel*, 202 F.2d 392 (3d Cir. 1953); *Kessler* v. *Strecker*, *supra*; *United States ex rel Schlimmgen* v. *Jordan*, *supra*; *Obrenovic* v. *Pilliod*, 282 F.2d 874 (7th Cir. 1960).

These well settled principles are applicable irrespective of the method employed by the alien to obtain judicial review of an order of exclusion and deportation entered against him. *Brownell* v. *We Shung*, 352 U.S. 180 (1956); *United States ex rel Tom We Shung* v. *Murff*, 176 F. Supp. 253 (S.D.N.Y.) *aff'd per curiam*, 274 F.2d 667 (2d Cir. 1959).

In the matter under consideration, appellant argues that judicial review of orders of exclusion and deportation is limited to the administrative record only by virtue of the provisions of Section 105(a) of the Act, 8 U.S.C. § 1105(a), and only in actions commenced by means of a petition for review or for declaratory judgment, which actions are governed by the provisions of Section 105(a). Appellant further argues that since the instant action was commenced by a petition for habeas corpus, the district court is not confined to the administrative record but must hold a trial *de novo* to determine the appellant's excludability from the United States. In light of the above, this argument is clearly without merit.

Furthermore, the argument ignores both the present and historical state of the law surrounding the challenging of orders of exclusion in the district courts by means of habeas corpus. Prior to the decision of the Supreme Court in *Shaughnessy* v. *Pedriero*, 349 U.S. 48 (1955) the only remedy available to an alien seeking

to challenge the validity of an exclusion order entered against him was by habeas corpus. C. Gordon and H. Rosenfield, Immigration Law and Procedure, Section 8.01 et seq., p. 8-74 et seq. (1976). See also *United States ex rel Tisi* v. *Tod*, 264 U.S. 131 (1924); *United States ex rel Vatjauer* v. *Commissioner of Immigration*, 273 U.S. 103 (1927). It was nevertheless consistently held that the reviewing court was without jurisdiction to order a trial *de novo* on the issue of an alien's excludability but rather was confined to the administrative record.

In *Kessler* v. *Strecker*, *supra*, for example, the Supreme Court, in deciding whether the district court erred in refusing to order a trial *de novo* to determine the deportability of an alien stated:

> The Circuit Court of Appeals remanded the cause to the District Court for a trial *de novo*. In this we think there was error. The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. . . . A District Court cannot upon habeas corpus, proceed de novo, for the function of investigation and finding has not been conferred upon it. . . . 307 U.S. at 34.

Indeed, with the limited exceptions of those cases in which the petitioner raises a claim of United States citizenship, or in which the hearing afforded by the Immigration and Naturalization Service is alleged to have been manifestly unfair, our research has found no cases which hold that a court, reviewing an order of exclusion or deportation in a habeas corpus proceeding,

may try *de novo* issues of fact which were previously considered or which should have been considered in the administrative proceedings. Furthermore appellant has not cited to a single case in support of his proposition.

After the Supreme Court's decision in *Pedriero* however, an alien was afforded the right to challenge the legality of an exclusion order by declaratory judgment in addition to the traditional method of habeas corpus. In fact, in 1961, Section 105(a) of the Act, 8 U.S.C. § 1105(a) codified that right and also provided for direct review of exclusion orders by petition to the district courts or to the courts of appeals. Nevertheless, despite this expansion in the number of remedies available to an alien to challenge exclusion orders, the scope of review of the courts determining those challenges has not been enlarged. H.R. Rep. No. 1086, 87th Cong., 1st Sess., 22-24 U.S. Code Cong. and Admin. News, 1961, p. 2930.

Section 105(a) of the Act, 8 U.S.C. § 1105(a) explicitly provides that a reviewing court is strictly limited to the administrative record and may not upset the determination of the Immigration and Naturalization Service unless it finds that no substantial evidence exists on the record to support the findings of the Service. Moreover, the Supreme Court has decided that the scope of review of the reviewing courts is not in any way expanded or enlarged as a result of the means by which the alien chooses to commence his action for review. *Brownell* v. *We Shung, supra; United States ex rel Brzovich* v. *Holton*, 222 F.2d 840 (7th Cir. 1955).

From the above, it is clear that whether an action for review of an order of exclusion is commenced by declaratory judgment, by petition for review, or by

habeas corpus, the scope of review of the courts is limited to the administrative record and the courts may not conduct a trial *de novo* or substitute their judgment for that of the Immigration and Naturalization Service.

Accordingly, since appellant does not claim to be a citizen of the United States and since he does not claim that the hearing provided him by the Immigration and Naturalization Service was manifestly unfair, the district court was correct in refusing to conduct a hearing *de novo* to determine whether he should be excluded from the United States.

POINT II

The decision of the Board of Immigration Appeals that Appellant was properly excludable as an immigrant not in possession of valid entry documents is in accord with the law and is supported by substantial evidence on the Administrative record.

On September 16, 1976, the Board of Immigration Appeals, after carefully considering all of the evidence of record and the arguments of appellant, decided that appellant was an immigrant who sought to enter and remain in the United States without a valid entry document and that accordingly, pursuant to the provisions of Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20) he should be excluded from the United States. Because this decision is in accordance with the law and is supported by substantial evidence on the administrative record, the order appealed from should be affirmed.

A. The decision of the Board is supported by substantial evidence on the Administrative record

The evidence of record consists mainly of a statement, sworn to by appellant on August 19, 1976 (App. A-7) and certain stipulations entered into at appellant's exclusion hearing between appellant (through counsel) and the trial attorney representing the Immigration and Naturalization Service. (App. A-9 et seq.).

The sworn statement of appellant reveals that appellant is a native and citizen of Greece who arrived in this country on August 18, 1976 without a visa or other valid document for entry into the United States; that he last entered the United States in January 1970 as a crewman, that he remained in the United States until May of 1976, and that at that time he departed for Costa Rica. It should be noted that this departure was occasioned by the fact that on August 18, 1975, he had been determined to be deportable (App. A-3) on the ground that he had illegally overstayed his visitors visa. Despite this order of deportation, appellant was permitted to depart voluntarily from this country. (App. A-4).

The sworn statement of appellant further recites that appellant went to Costa Rica in order to obtain an immigrant visa which would permit him to enter into the United States. However, the statement reflects that after two and one-half months in Costa Rica, the government there deported him from that country. Appellant then arrived in this country aboard a Pan American flight *without a valid entry document* and as a result, officials of Pan American airlines instructed appellant that he should immediately proceed from the United States to Greece as an alien in transit without a visa. Appellant,

refused and argued that he could not go on to Greece since he lacked valid travel documents for that purpose.[3]

With respect to the evidence before the Board, to which appellant stipulated at his exclusion hearing, appellant agreed that he arrived in the United States on August 18, 1976 as a passenger on board Pan American Flight 542 from Costa Rica. (App. A-11).

Since appellant was not detained by the Immigration authorities until August 19, 1976, one full day after appellant's arrival here, which information was clearly before the Board (App. A-5, A-11), the Board was fully justified in finding that appellant sought to enter and remain in the United States.

Appellant further agreed that he was not admitted into the United States, that he was a Greek citizen, that he was never admitted as a permanent resident to the United States, that his parents were never United States citizens; (In essence, appellant agreed that he had no claim to legal entry into the United States); that appellant was deported from Costa Rica to the United States and that appellant was not at the time of his arrival in this country, in possession of any valid entry documents.

From these admissions alone, it is clear that appellant was an immigrant who possessed no valid entry documents at the time of his application for entry into the country and was therefore deportable, and the Board was justified in so finding.

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[3] It is significant to note that appellant did not possess valid documents to enter any country, including the United States and appellant did not dispute this fact before the Board. Therefore, since he stated that he was a Greek national and citizen, appellant's only choice was to proceed on to Greece or remain in the United States illegally. It was these facts which formed the basis for the Board's decision that appellant intended to remain in this country (App. A-28).

It should be noted that it is appellant's burden to show that he was not an immigrant without valid entry documents. Section 214(b) of the Act, 8 U.S.C. § 1184 (b). Since, by appellant's own statements, he has admitted to each of the elements necessary for the Board to conclude that he was excludable and since no evidence exists in the record except as is above outlined, it is clear that appellant has not sustained his burden of proof; that the decision of the Board was supported by substantial evidence on the Administrative Record and that the Board's decision should therefore be affirmed.

B. The decision of the Board is in accord with the law

Appellant contends that by virtue of the fact that he arrived in this country as a result of an order of deportation of the Costa Rican government, he did not enter the United States intentionally and is not an immigrant within the meaning of Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), subject to exclusion under Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20).

In support of these contentions, appellant, at the time of his exclusion hearing and before the Board, cited *United States ex rel Bradley* v. *Watkins*, 163 F.2d 328 (2d Cir. 1947); *United States ex rel Paetau* v. *Watkins*, 164 F.2d 457 (2d Cir. 1947) and *United States ex rel Sommerkamp* v. *Zimmerman*, 178 F.2d 645 (2d Cir. 1949). Each of these cases is factually distinguishable from the instant appeal and therefore inapposite.

The *Bradley* and *Sommerkamp* cases involved identical factual situations, in which the aliens were seized on foreign soil by armed forces of the United States Government, were forceably brought to our shores as prisoners

and subsequently were subjected to deportation proceedings as immigrants who entered the United States without valid entry documents. In each case it was held that where the United States government actively participated in the process of entering an alien into the country, it could not then deport that alien without affording him an opportunity to depart voluntarily. In the *Paetau* case, the alien was deported to Germany by Guatemalan authorities but, with the explicit consent of the United States, was disembarked in America. The Court, holding that there was no significant difference between the situation in which the United States forceably brought an alien into this country and the situation in which the alien was brought here forceably by a foreign government with the consent and approval of the United States, ruled that, as was held in *Bradley*, before the alien could be deported, he must first be permitted to voluntarily depart from this country. See also *United States ex rel Scherrmeister* v. *Watkins*, 171 F.2d 858 (2d Cir. 1949); *United States ex rel Ludwig* v. *Watkins* 164 F.2d 456 (2d Cir. 1947).

Analysis of these cases, therefore, reveals that the controlling factors underlying each of the decisions are that the United States government either participated, consented or acquised in the effecting of the alien's presence in this country and that once in this country the alien was refused permission to leave prior to his deportation. Indeed, in the *Bradley* and *Sommerkamp* cases, the courts expressly held that the decisions should be limited to the narrow situation in which the alien was not given an opportunity to voluntarily depart.

Moreover, the law is clear that an alien who is deported from a foreign country into the United States without the approval or consent of this country and without valid entry documents is subject to exclusion pursuant to Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20). See

United States ex rel Lindenau v. *Watkins*, 73 F. Supp. 216 (S.D.N.Y., 1947). In this appeal, appellant does not allege any such consent or participation. Nor is there evidence to support such a finding. The administrative record is however replete with evidence that appellant was afforded an opportunity to depart this country for Greece. Indeed he was instructed by officials of Pan American airlines that he was obligated to do so. Yet appellant chose not to avail himself of the opportunity and, on the day following his arrival in New York, since he had no entry documents, the immigration authorities had no choice but to detain him.

Nevertheless, appellant continues on this appeal to place his reliance on the above cited cases to support his contention that he is not an immigrant within the meaning of Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15) and that he therefore should not be excluded pursuant to Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20). Appellant now cites *Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947) and *DiPasquale* v. *Karnuth*, 158 F.2d 878 (2d Cir. 1947) in support of his contentions.

However, as it was with the cases previously discussed, these cases are inapplicable:

In *Delgadillo*, the question presented was whether an alien, who through wholly fortuitous circumstances completely beyond his control is forced onto American soil, has made an "entry" into the United States within the meaning of Section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13). The Supreme Court, answering the question in the negative, noted that:

> the alien had no part in selecting the foreign port [the United States] as his destination. His itinerary was forced upon him by wholly fortuitous circumstances. 332 U.S. at 390.

In *DiPasquale* v. *Karnuth*, a similar question was presented. There it was held that where an alien traveling between Buffalo and Detroit boarded a train which, unbeknown to him, passed through Canada, no "re-entry" into the United States occurred so as to subject the alien to deportation.

The relevance of these cases to the issues herein presented is unclear. The sole issue in both cases was whether the alien made an entry into the United States. Here, the question of appellant's entry is not in dispute. In fact, appellant and the Immigration authorities stipulated that he did not enter the United States (App. A-12). Moreover, the findings in both *Delgadillo* and *DiPasquale*, rested on the fact that the aliens involved had absolutely no control over their fates and that their arrivals in this country were fortuitous. By comparison, appellant did not arrive in this country fortuitously but rather, it was his own deliberate and chosen course of conduct which effected his presence in the United States. The evidence of record is clear and convincing that appellant was deported from Costa Rica to this country as a result of his illegal conduct in Costa Rica (App. A-12, A-8) and only for the purpose of allowing appellant to continue on to Greece. Moreover, it was appellant's own conduct in refusing to continue on to Greece but instead in applying for entry into this country which caused appellant to be detained.[4]

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[4] Appellant contends that there is no evidence on the record which proves that he made an application for admission in this country. It should be noted that it is appellant's burden to establish that he is not excludable. 8 U.S.C. § 1184(b). Moreover, appellant's counsel in his brief before this court, concedes that appellant appeared at the immigration inspection station at the request of Pan American officials and not at the insistence of the United States. Once he presented himself for inspection, the authorities had no choice but to detain him. There is no allegation that appellant was in any way forced to present himself for inspection.

Therefore, since it was appellant's consistent and continual violation and evasion of the laws of this country and of Costa Rica for a period of more than six years which form the web in which appellant now finds himself entangled, appellant cannot now be heard to complain that his arrival in this country was fortuitous.

Accordingly, the decision of the Board to exclude appellant was in accord with the law and was supported by substantial evidence on the administrative record.

POINT III

The decision of the District Director to grant Appellant parole on the condition that he post a $5,000 appearance bond may not be upset by this Court.

Appellant urges that this Court should review the decision of the Attorney General [5] to parole him into this country on the condition *inter alia* that he post a $5,000 bond and to find that decision to be an abuse of the Attorney General's discretion. This argument is meritless.

In the first instance, the decision of the Attorney General to grant or deny parole to an alien who is denied entry into the United States is not subject to review by this Court. It has been well established that since the authority to grant or deny parole derives from the power of the executive branch of government to regulate the nation's foreign affairs, the decision of that branch in

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[5] The Attorney General has delegated his "discretion" under this parole statute to the "district director [of the Immigration and Naturalization Service] in charge of a port of entry." 8 C.F.R. § 212.5(a).

the exercise of the executive power, at least as they relate to the exclusion of aliens, are clearly not reviewable by the judicial branch of government. *Petition of Cahill*, 447 F.2d 1343 (2d Cir. 1971), *United States ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950); *United States* v. *Curtis-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893).

More specifically, it is clear that decisions of the Attorney General pursuant to Section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5) with respect to the parole of aliens not admitted into this country are discretionary and are not reviewable by any court. *Petition of Cahill*, *supra*, *Chin Ming Mow* v. *Dulles*, 117 F. Supp. 108 (S.D.N.Y. 1953).

Accordingly, this court may not review the determination of the District Director of Immigration that appellant should be paroled only on the condition that he post an appearance bond.

It should be noted that an alien who has not been admitted into the United States (and appellant agrees he has not been) is not afforded the panoply of rights under the constitution of a person who is admitted. *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892); *Shaughnessy* v. *United States ex rel Mazei*, 345 U.S. 206 (1953). Therefore, appellant cannot be heard to complain that his release under the terms imposed herein is an unconstitutional denial of his Fifth or Eighth Amendment rights.

It should likewise be noted that each of the cases cited by appellant for the proposition that he should be released from custody unless it can be shown that he is a

risk to the national security are wholly inapplicable to the facts of this case. These cases are concerned solely with the situation in which an alien who has already entered the United States and who as a result is entitled to the protections of the Constitution has been taken into custody for violation of the immigration laws and then seeks to be released pursuant to Section 242 of the Act 8 U.S.C. § 1252. In this case, appellant has not been admitted into the United States and is therefore not subject to the protection of the Constitution. Rather as was above illustrated, he is subject exclusively to the discretion of the executive branch of government and that branch has determined that he should not be paroled except upon the terms that it has set forth.

Assuming arguendo that this court was empowered to review the determination of the Attorney General that appellant's parole should be conditioned on the posting of a bond, the facts here do not warrant a reversal of that decision. Section 212(d)(5) of the Act, 8 U.S.C. § 1182 (d)(5) provides:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

From the very terms of this statute, it is clear that only in emergent circumstances or for reasons deemed strictly to be in the public interest may the Attorney General or his delegate grant parole. There is no other provision in the law for release of an alien on parole. *Conceiro* v. *Marks*, 360 F. Supp. 454 (S.D.N.Y. 1973).

The record does not support a finding that emergent circumstances existed or that the national interest would be benefited by allowing appellant to be paroled into the United States, nor does appellant allege any such circumstances or that the national interest would be effected.

Rather the record reveals that appellant has evaded and violated the laws of this country by remaining for more than five years after his visitor's visa had expired in 1970; that as a result he was determined to be deportable, but was allowed voluntarily to depart from this country; that within two and one-half months from his departure, he returned to the United States and illegally refused to continue on to Greece his native country, and that he had no ties whatsoever in this country.

On such a record it can hardly be contended that the District Director abused his discretion in granting appellant parole on the condition that he post a bond. Therefore the decision of the Attorney should be upheld.

CONCLUSION

For the reasons hereinbefore set forth and upon the record below, the order of the United States District Court for the Eastern District of New York dismissing the petition in this action should be affirmed.

Dated: Brooklyn, New York
November 29, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 2nd day of December, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Marion R. Ginsberg, Esq.
233 Broadway
New York, New York 10007

Sworn to before me this
2nd day of December, 1976

Martha Schaap

CAROLYN N. JOHNSON

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